Supreme Court, U.S.
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No.

IN THE

# Supreme Court of the United States

PACIFIC PROPERTIES AND
DEVELOPMENT CORPORATION, PETITIONER

*v.*

RONALD RAY SMITH AND
DISABLED RIGHTS ACTION COMMITTEE

*PETITION FOR A WRIT OF CERTIORARI*
*TO THE UNITED STATES COURT OF APPEALS*
*FOR THE NINTH CIRCUIT*

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

The Disabled Rights Action Committee (DRAC), an organization that seeks to enforce fair housing rights for the disabled, filed suit against Pacific Properties and Development Corporation, a property developer in Las Vegas, Nevada and the Petitioner herein. The suit alleged that certain features in several multifamily communities in Las Vegas violated the design and construction requirements of the Fair Housing Amendments Act. DRAC claimed standing to sue as a representative of an individual member of the organization who's only claimed injury was physically observing allegedly discriminatory features during visits to the various properties at issue. Petitioner moved to dismiss DRAC's suit on the grounds that DRAC had not, and could not allege sufficient facts to demonstrate a constitutionally cognizable injury to one of its members. The District Court granted Petitioner's motion. On appeal, the Ninth Circuit Court of Appeals held that the dignitary harm suffered by merely observing an allegedly discriminatory design feature caused a sufficient injury for a party to have standing to sue under the case or controversy clause of Article III of the United States Constitution. Thus, the Ninth Circuit's decision recognized a new class of injury, which does not fall within this Court's prior decisions requiring a party to demonstrate a distinct and palpable injury in order to have standing to sue. As a result of this decision, parties who have not suffered a distinct and palpable injury would be permitted to sue in federal courts violating the requirement of Article III of the United States Constitution that federal courts shall only hear actual cases or controversies.

1. Whether the Ninth Circuit Court of Appeals ruling that the dignitary harm caused by mere observation of an allegedly discriminatory act causes a sufficient injury to convey standing to sue violates the restriction of the United States Constitution, Article III that federal courts may only hear actual cases or controversies.

2. Whether the dignitary harm to an individual caused by mere observation of an allegedly discriminatory act constitutes the distinct and palpable injury required for that individual to have standing to sue in federal courts.

## PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding are properly set forth in the case caption except that Ronald Ray Smith is no longer a party to this case due to his death. Petitioner Pacific Properties and Development Corporation has no parent corporation and no publicly held company owns ten percent or more of the corporation's common stock.

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## OPINIONS BELOW

The opinion of the three-judge panel of the Ninth Circuit Court of Appeals is reported as *Smith v. Pacific Properties and Development Corp.*, 358 F.3d 1097 (9th Cir. 2004). The opinion of the District Court for the District of Nevada was not reported but is included in the appendix at 22a.

## JURISDICTION

The judgment of the Ninth Circuit Court of Appeals in this case was entered on January 26, 2004. Pacific Properties and Development Corporation filed a timely petition for rehearing *en banc* which the Ninth Circuit denied in its order dated March 11, 2004. The Court of Appeals had Jurisdiction pursuant to 28 U.S.C. § 1291. Jurisdiction in the Court is invoked pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitution, Article III, Section 2 states: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States..."

42 U.S.C. § 3604(f)(2) states: "...it shall be unlawful ... [t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of--

**(A)** that person; or
**(B)** a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or
**(C)** any person associated with that person.

## STATEMENT

### I. OVERVIEW OF THE CASE

This case stems from claims under the Fair Housing Act bought by the Disabled Rights Action Committee ("DRAC") in the United States District Court for the District of Nevada. DRAC alleged that the federal courts had subject matter jurisdiction over its claims under 26 U.S.C. 1331. Since DRAC's claims arise under the Federal Fair Housing act, the claims in this case present federal questions, and jurisdiction in the District Court was proper under that provision. Pacific Properties and Development Corporation moved to dismiss DRAC's claims on the grounds that it failed to allege sufficient injury to demonstrate standing to sue. The District Court dismissed DRAC's claims on that basis. DRAC appealed the District Court's dismissal order after unsuccessfully seeking reconsideration of that order. On appeal, the Ninth Circuit Court of Appeals held that the dignitary harm caused by mere observation of an allegedly discriminatory construction feature created a sufficient injury for an individual plaintiff to have standing to sue. This holding substantially erodes the requirement to

allege a distinct and palpable injury that this Court has previously established.[1]

## II. FACTUAL BACKGROUND OF CASE

DRAC initially filed this action[2] seeking damages for allegedly discriminatory construction at five Las Vegas multi-family housing projects allegedly built by Pacific Properties and Development Corporation. These properties, four of which were already the subject of a consent decree based on a case brought by the United States Department of Justice, allegedly contained construction features which were discriminatory pursuant to 42 U.S.C. §3604(f)(2). DRAC alleged that one or more of its members had visited the properties and observed various allegedly discriminatory construction features. Based solely on that observation of the alleged discriminatory conditions, and without having any further interest in any of the properties, DRAC claimed that its members had standing to bring a claim under the Fair Housing Act. Therefore DRAC claimed standing of its own as a representative of its members.

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[1] The Ninth Circuit also held that DRAC alleged sufficient injury to its organizational interests to defeat a Motion to Dismiss under Fed. R. Civ. P. 12 and that the remedy of disgorgement was not available to DRAC in this case. Petitioner does not seek review of either of these holdings.

[2] An individual member of DRAC, Ronald Ray Smith, also filed suit in his own name, however, he died before the Appellate proceedings commenced. The injuries to Mr. Smith were, however, part of the basis for DRAC's claim of representational standing.

## ARGUMENT IN SUPPORT OF PETITION FOR CERTIORARI

Pursuant to Supreme Court Rule 10(a) this Court may grant a petition for certiorari when "a United States court of appeals ... has so far departed from the accepted and usual course of judicial proceedings, ... as to call for an exercise of this Court's supervisory power." U.S.Sup.Ct. Rule 10(a). Furthermore, under Supreme Court Rule 10 (c), granting a petition for certiorari is appropriate when a United States court of appeals has decided "an important federal question in a way that conflicts with relevant decisions of this Court." U.S.Sup.Ct. Rule 10(c). In this case, the Ninth Circuit Court of Appeals decision both conflicts with prior decisions of this Court and has departed so far from the appropriate course of judicial proceedings that exercise of this Court's supervisory power is called for. The Ninth Circuit decision essentially does away with the requirement that an individual allege a distinct and palpable injury in order to have standing to sue in federal courts. As this Court has previously held that the distinct and palpable injury requirement stems from the United States Constitution's grant of limited jurisdiction to the federal courts under Article III, the Ninth Circuit's ruling is in direct conflict with the Constitution. Since the scope of standing under Article III has been referred to as an irreducible Constitutional minimum, there can be no doubt that the Ninth Circuit decided an important federal question. As will be shown below, that decision creates significant conflict with relevant decisions of this Court, and therefore, it is appropriate to grant this petition for certiorari. Since the decision also sanctions the exercise of federal jurisdiction in a

manner that violates the jurisdictional grant contained in Article III of the Constitution, it also constitutes a significant departure from the appropriate course of judicial proceedings. On that basis, it is also appropriate to grant this petition.

A. Analysis of the Ninth Circuit's Decision.

In order to truly appreciate the conflict with this Court's jurisprudence created by the Ninth Circuit, it is necessary to analyze the basis behind its decision. One basis for DRAC's claim of standing in this case was as a representative of its members. Specifically, DRAC claimed to represent the interests of Ronald Ray Smith ("Smith") who began the case as a named plaintiff but who died following the District Court's initial dismissal of the case. The Ninth Circuit noted that DRAC would have representational standing in part if Smith or other individual members would have standing to sue in their own right. 358 F.3d at 1101-02. Accordingly, the Ninth Circuit analyzed Smith's standing as an individual for the purpose of evaluating DRAC's standing claim. DRAC claimed that Smith was a "tester" who visited properties to ensure compliance with the Fair Housing Act. DRAC further claimed that some of its other members acted as testers and likewise visited the properties for purposes of testing. Most significantly, DRAC disavowed any interest on the part of any of its members in any of the properties short of observing the properties to determine whether they were compliant with the Fair Housing Act. No one claimed an interest in living in any of the properties or visiting them for any purpose other than observation. 358 F. 3d at 1102. Additionally, there is no evidence in the record to indicate that any of the "testing" in this case consisted

of anything more than observation of conditions already visible to any other party present at the premises in question. Specifically, there was no evidence of any testing activity consistent with what might be seen in a claim of racially discriminatory housing practices. In those cases, testers typically solicit information not readily perceivable to the naked eye.

DRAC has at times attempted to construe this case as one of determining whether testers should have standing to bring cases under 42 U.S.C. §3604(f)(2). However, that is simply not the issue here. Indeed, the District Court, in its ruling originally dismissing the case noted that it was not finding that there was no circumstance under which a tester could allege standing to sue pursuant to 42 U.S.C. §3604(f)(2). However, the District Court found that the Plaintiffs in this case had not alleged sufficient facts to demonstrate standing. 358 F.3d at 1104. An accurate description of the issue in this case is whether Smith suffered an injury that was legally cognizable under Article III of the United States Constitution so as to have standing. The essence of the Ninth Circuit's Opinion on that issue is as follows:

> To raise an additional standing requirement into the statute beyond *mere observation*, however, ignores that many overtly discriminatory conditions for example, lack of a ramped entry way, prohibited disabled individuals from forming the requisite intent or actual interest in renting or buying for the very reason that architectural barriers prevent them from viewing the whole property in the first instance. More importantly, the

> District Court's reasoning fails to recognize the dignitary harm to a disabled person of observing such overtly discriminatory conditions.

*id.* (emphasis added).

The Ninth Circuit found that observation of allegedly discriminatory construction features could injure a plaintiff in one of two ways. First, either the observation discouraged the person from forming any further interest in the property in the first place, or second, the observation caused the person "dignitary harm." However, analysis of the record in this case, demonstrates that only one of those two potential injuries could have applied to Smith in this case. DRAC has acknowledged that its members, including Smith, lacked any interest in the properties prior to ever observing them. 358 F. 3d at 1102. Therefore, neither Smith nor any other DRAC member was injured by having a potential interest in these properties snuffed out by observing an allegedly discriminatory construction condition. Thus, the Ninth Circuit's decision must rest on a finding that the dignitary harm suffered by Smith merely observing a potentially discriminatory construction feature caused an injury sufficient to satisfy Constitutional requirements for standing. In other words, the Ninth Circuit holds that anyone merely observing a potentially discriminatory condition has suffered a sufficient injury to bring a claim for damages.

B. The Ninth Circuit's holding would broadly expand the class of people with standing to sue in federal courts.

It is appropriate for this Court to consider the impact that the rule set forth by the Ninth Circuit would have on litigation. If merely observing a discriminatory act or condition gives a party standing, then imagine some of the cases that could be brought. For example, a woman who witnesses another woman being discriminated against would suffer dignitary harm from observing that sexual discrimination. Under the Ninth Circuit rule, that woman who was not the direct victim of sexual discrimination would nonetheless be able to bring a claim for damages. Likewise, if some party observed a test for racially discriminatory housing practices (on videotape for example) then that person would suffer dignitary harm and would have standing to bring a claim for housing discrimination. Or, more directly relating to the facts in this case, any person traveling down a public sidewalk past a housing development who sees a stair in a walkway within that development could bring a discrimination case.[3]

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[3] While the Ninth Circuit spoke to the dignitary harm disabled persons would suffer from viewing overtly discriminatory conditions, it would not be a stretch at all to state that non-disabled persons would likewise suffer dignitary harm by observing overtly discriminatory conditions. Indeed, the language of 42 U.S.C. 3604(f)(2) is explicitly not limited just to disabled persons. Thus, a logical reading of the Ninth Circuit's opinion would be that it conveys standing on anyone who observes a discriminatory act, not just on people who observe discriminatory acts against classes to which that person belongs.

If allowed to stand, the Ninth Circuit decision would broadly expand the ability of litigious parties to bring and maintain suits under the Fair Housing Act (as well as other federal laws) and would certainly create the potential for a flood of fair housing litigation from persons with at best tangential claims of harm. Indeed, one can imagine a host of people driving by a housing project with accessibility issues just so they could claim damages under the Fair Housing Act. "drive-by" claims such as that are completely contrary to the requirement of Article III that courts should decide only actual cases or controversies. The rule set forth in the Ninth Circuit's opinion would, carried through to its logical conclusion, morph the Courts from being judicial arbiters of disputes to being ombudsmen for hearing the complaints of any party witnessing alleged discrimination.

Indeed, there is no reason, based on the Ninth Circuit's decision to think that the mere observation of a discriminatory condition would be limited to visual observation. If a single brief observation of a discriminatory condition causes sufficient injury to convey standing, then wouldn't the perception of such a condition by any other sense likewise cause such an injury? In evaluating the Ninth Circuit decision, this Court should ask whether, under that decision, someone who is told about the existence of a discriminatory condition would suffer the same dignitary harm as someone directly observing the condition. After all, the dignitary harm stemming from visually observing discrimination results from gaining knowledge about the existence of a particular act of discrimination. If gaining that knowledge is what causes harm, then would it matter whether that

knowledge was gained through direct observation or from other means? Petitioner would submit that a principled application of the Ninth Circuit's decision would also convey standing on a party who learns about a particular act of discrimination. As this Court can see then, the Ninth Circuit did far more then address an issue relating to tester standing under 42 U.S.C. 3604(f)(2). It explicitly recognized a type of injury sufficient to convey standing, that injury being the mere observation of discrimination. Nothing in the Ninth Circuit's decision limits that injury to observations made as part of some organized test, and indeed such a limitation would be totally artificial. There can simply be no doubt that the Ninth Circuit's recognition of this "mere observation" injury expands the types of injury conveying standing on parties, for, as will be shown below, examination of this Court's prior standing jurisprudence demonstrates that claims of standing by parties who observed discriminatory or other illegal conditions have been rejected. Therefore, the Ninth Circuit's decision significantly conflicts with this court's prior decisions regarding standing and granting this petition for certiorari is appropriate.

C. This Court has previously had the opportunity to recognize standing for individuals who "merely observe" discriminatory or other illegal acts and has never extended standing that far.

This Court has noted that standing is the constitutional minimum to maintain a suit in Federal Court. *Warth v. Seldin*, 422 U.S. 490; 95 S. Ct. 2197. In *Warth*, the Court stated:

> The Article III judicial power exists only to redress or otherwise to protect against injury to the complaining party, even though the Court's judgment may benefit others collaterally. A Federal Court's jurisdiction therefore can be invoked only when the Plaintiff himself has suffered 'some threatened or actual injury resulting from the putatively illegal actions . . . .'

*Id.* at 499 , 95 S. Ct. at 2205.

Some of the Plaintiffs in *Warth* observed arguably illegal acts, and this Court still found those Plaintiffs lacked standing. The *Warth* Plaintiffs were a group of people and organizations challenging zoning practices in the City of Penfield, New York. The Plaintiffs claimed that Penfield's zoning practices were calculated to exclude residents of low or moderate income from buying homes in Penfield. *Id.* at 493, 95 S. Ct. at 2202. One particular class of Plaintiffs contained low to moderate income residents of neighboring Rochester who claimed injury stemming from Penfield's zoning rules. *Id.* at 502, 95 S. Ct. at 2207. This Court noted that these Plaintiffs would lack standing even assuming that the Defendant's actions were illegal and were calculated to exclude persons of low or moderate income from residing in Penfield. *Id.* at 504-07, 95 S. Ct. at 2208-10. The Court noted that the Plaintiffs would lack standing because there was no demonstration that they had a present interest in any property in Penfield or that reversal of Penfield's practices would enable them to afford housing in Penfield. The Court contrasted the Plaintiff's situation

in *Warth* with cases where Plaintiffs had been found to have standing after challenging zoning restrictions which applied to particular projects that would supply housing within those Plaintiffs means and of which they were intended residents. *Id.*

While not precisely on point with this case, the *Warth* case is illustrative of relevant issues bearing on the standing question in this case. Certainly, the *Warth* Plaintiffs who were found to lack standing had observed allegedly discriminatory acts and would have suffered dignitary harm as a result of the purportedly illegal conduct. However, this Court found that such a claim was not sufficient to convey standing. Of particular interest, is the distinction drawn with Plaintiffs who challenge restrictions that impacted housing in which they were directly interested. Smith and the other individual members of DRAC are in the same position as the Plaintiffs in *Warth.* They have observed allegedly discriminatory conduct from which they claim harm, but that discriminatory conduct has not impacted them in any way beyond mere observation. By recognizing standing in a situation very analogous to the one encountered by this Court in *Warth* the Ninth Circuit established a rule conflicting with this Court's prior decisions.

The Ninth Circuit's decision also conflicts with decisions of this Court regarding the standing of private parties to enforce federal environmental laws. The first of these cases is *Sierra Club v. Morton*, 405 U.S. 727, 92 S. Ct. 1361 (1972). In that case, the *Sierra Club* attempted to bring a federal case stating that it was fulfilling its organizational purpose of protecting the Sierra Nevada Mountains. The *Sierra Club* argued

that it had standing to represent the interests of its members. The *Sierra Club* however failed to allege that any of its members used the park areas in question in the case. This Court noted that in the absence of any indication that any of the *Sierra Club* members were actual users of the areas in question, that they did not allege sufficient injury. The Court stated that a Plaintiff must have more than "a mere interest in a problem." *Id.* at 739, 92 S. Ct. at 1368. Furthermore, the Court observed that a Plaintiff must "allege facts showing that he is himself adversely affected." *Id.* at 740, 92 S. Ct. at 1369. Certainly, the *Sierra Club* case presented a situation where the Sierra Club members, who did not use the park areas in question, but who could have observed allegedly illegal conduct there could have suffered "dignitary harm." However, this Court did not find the allegations in the *Sierra Club* case sufficient to allege standing. Thus the Ninth Circuit decision in this case is also in conflict with the *Sierra Club* case.

Likewise, in the case of *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 112 S. Ct. 2130 (1992), the Plaintiffs challenged agency actions they alleged would result in damage to the habitat of certain animal species. The Plaintiffs in *Lujan* alleged that in the past they had visited the area in question and that they intended to visit the area in the future. This Court said that allegation of injury was not immediate enough to demonstrate standing. *Id.* at 564, 112 S. Ct. at 2138. Again, the *Lujan* case presented situations where the group's members certainly were in the position to observe potentially illegal conduct, and the Court found that such exposure did not allege a sufficient injury to convey standing.

Examination of this Court's cases regarding standing to sue under the Fair Housing Act likewise fail to reveal any case which suggests that dignitary harm caused by merely observing alleged discrimination caused injury sufficient to convey standing. The case of *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 S. Ct. 1601 (1979) was an opportunity for this Court to recognize such injuries. That case dealt with claims of racial steering by multiple Plaintiffs. The Supreme Court found that certain of those Plaintiffs who lived in a neighborhood allegedly injured as a result of the steering practices in question, had standing. However, Plaintiffs who lived outside of that neighborhood lacked standing. The distinction between those two classes of Plaintiffs is quite clear. Those living inside the allegedly damaged neighborhoods suffered some injury by virtue of their presence in the injured neighborhood. However, those Plaintiffs residing outside of that area, while they were clearly in a position to observe the harm caused to the injured neighborhood did not allege a sufficient injury. The clear implication from this case is that some injury *beyond* the dignitary harm suffered as a result of merely observing a discriminatory act is required for standing.

Similarly, in the case of *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 102 S. Ct. 1114 (1982) this Court noted "we have not suggested that discrimination within a single housing complex might give rise to 'distinct and palpable injury' . . . throughout a metropolitan area." 455 U.S. at 377, 102 S. Ct. at 1123. The *Havens* Court stated:

> It is indeed implausible to argue that Petitioner's alleged acts of discrimination could have palpable effects throughout the entire Richmond metropolitan area. *Id.*

Again, *Havens* demonstrated a situation where people in a position to observe the existence of discrimination in a single housing complex did not have standing to sue based merely on that observation.

The only conclusion to be drawn from this Court's consistent refusal to find that parties in a position to observe discrimination had standing to sue is simple. Mere observation of an act of discrimination does not cause a constitutionally cognizable injury. However, the Ninth Circuit's decision would recognize standing on the part of such individuals. If the Court denies this petition and elects not to hear this case, plaintiffs in the Ninth Circuit will operate under a drastically different view of standing then what this Court has previously recognized as proper.

D. Conclusion

This Court has always said that the irreducible constitutional minimum of standing requires that a person suffer a distinct and palpable injury fairly traceable to the actions of the defendant and redressable by the action of a court. By ruling that merely observing allegedly discriminatory construction causes a sufficient injury to convey standing to sue, the Ninth Circuit's Opinion has eroded the irreducible constitutional minimum of standing. The Panel has created an entirely new class of injury sufficient to convey standing and such injury is violative of the

requirements of Article III of Constitution. For those reasons, and for all the reasons set forth above, this Court should grant Pacific Properties' Petition for Certiorari.

Respectfully submitted,

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(Any footnotes trail end of each document)

No. 03-15656

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RONALD RAY SMITH,
Plaintiff,

And

DISABLED RIGHTS ACTION COMMITTEE,
a Utah non-profit corporation,
Plaintiff-Appellant,

v.

PACIFIC PROPERTIES AND DEVELOPMENT
CORPORATION, a Nevada corporation,
Defendant-Appellee.

December 5, 2003, Argued and Submitted,
San Francisco, California
January 26, 2004, Filed

COUNSEL: Richard F. Armknecht, Armknecht & Cowdell, Lindon, Utah, for Plaintiff-Appellant Disabled Rights Action Committee.

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JUDGES: Before: Michael Daly Hawkins, Richard A. Paez, and Marsha S. Berzon, Circuit Judges. Opinion by Judge Hawkins.

OPINION BY: Michael Daly Hawkins

OPINION: HAWKINS, Circuit Judge:

In a case of first impression, we must decide whether a disabled person seeking to enforce rights created by § 3604(f)(2) of the Fair Housing Amendments Act ("FHAA"), Pub. L. No. 100-430, 102 Stat. 1619 (codified as amended at 42 U.S.C. §§ 3601-3619, 3631 (1988)), must have an interest in actually purchasing or renting a particular property or dwelling in order to allege a discriminatory violation. *See* 42 U.S.C. § 3604 (1988). We also face a related question: whether Plaintiff-Appellant Disabled Rights Action Committee ("DRAC") may have organizational standing to allege FHAA violations based on its own articulated "injury in fact." Because we answer the first question in the negative and the second in the affirmative, we reverse the district court's dismissal for failure to state a claim and denial of motion to reconsider, and remand for further proceedings. We do, how-ever, agree with the district court that disgorgement, one of the remedies sought by Appellant, is inappropriate in any case and therefore also affirm in part.

FACTS AND PROCEDURAL HISTORY

The nature of the district court's dismissal requires us to accept as true the factual allegations of DRAC's complaint and to construe those facts in the light most

favorable to the plaintiff. Pareto v. FDIC, 139 F.3d 696, 699 (9th Cir. 1998).

In late 1997 and early 1998, Robert Ray Smith, a wheelchair-bound polio victim, began investigating multi-family housing developments in Clark County, Nevada, as part of a program to test compliance with the FHAA. n1 The tester program of which Smith was a part was organized and implemented by DRAC, a non-profit organization promoting the rights of disabled persons in Utah and Nevada. As a result of his investigations, Smith discovered discriminatory design and construction defects in four properties designed and built by Defendant-Appellee Pacific Properties Development Corporation ("Pacific Properties"). n2 These defects included, *inter alia*, inaccessible interior doorways, pathways and thermostats.

Based on these discoveries, Smith and DRAC filed administrative complaints with the United States Department of Housing and Urban Development ("HUD"). HUD conducted its own investigation, confirmed the existence of apparent FHAA violations and instituted compliance litigation resulting in a consent decree with Pacific Properties. Under the decree, Pacific agreed to make certain adjustments to the four housing developments in accordance with an injunction prohibiting discrimination on the basis of disability in violation of 42 U.S.C. § 3604(f)(3)(C). Uninformed of the terms of the consent decree, Smith visited another Pacific development, Savannah at Silverado Ranch, after the decree was entered and again encountered "various architectural barriers in the common areas."

Dissatisfied with a lack of notice of the entry of the decree as well as its scope and reach, Smith and DRAC initiated the instant litigation in district court, claiming that conditions in all five Pacific Properties developments violated § 3604(f)(2)'s prohibition of discrimination "against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of--[*inter alios*] that person." n3

On motion of Pacific Properties, the district court dismissed the complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim, determining that neither a tester in Smith's circumstance nor an organization like DRAC had standing to assert rights under the FHAA. n4 DRAC subsequently moved for reconsideration under Fed. R. Civ. P. 59(e). In that motion, DRAC alerted the court that Smith had passed away, and asked that the court reconsider its motion to amend the complaint to include supplemental facts in support of its own representational and organizational standing in light of Smith's death.

The district court denied DRAC's reconsideration motion without articulating the basis for denial. DRAC appeals both the dismissal and the denial of the motion for reconsideration. We have jurisdiction over both orders under 28 U.S.C. § 1291 because the post-judgment denial of reconsideration is an "integral part" of the final judgment on the merits, even though not entered concurrently with that judgment. *See* United States v. One 1986 Ford Pickup, 56 F.3d 1181, 1184-85 (9th Cir. 1995) (per curiam).

STANDARD OF REVIEW

We review the denial of a motion for reconsideration for abuse of discretion, Kona Enters., Inc. v. Estate of Bishop, 229 F.3d 877, 883 (9th Cir. 2000). The same standard of review applies to denial of leave to amend. Zivkovic v. S. Cal. Edison Co., 302 F.3d 1080, 1087 (9th Cir. 2002). Whether such a denial rests on an inaccurate view of the law and is therefore an abuse of discretion, *see* United States v. State of Washington, 98 F.3d 1159, 1163 (9th Cir. 1996), requires us to review the underlying legal determination *de novo*. *See* Southwest Voter Registration Educ. Project v. Shelley, 344 F.3d 914, 918 (9th Cir. 2003) (en banc) (per curiam).

Because it is the only facially viable basis for denial of DRAC's motion to reconsider, we assume that denial was premised on the futility of amendment in light of the district court's legal ruling on the scope of § 3604(f)(2). n5 As the Supreme Court has explained: In the absence of any apparent or declared reason--such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.--the leave sought should, as the rules require, be "freely given."Foman v. Davis, 371 U.S. 178, 182, 9 L. Ed. 2d 222, 83 S. Ct. 227 (1962). There is no allegation or evidence of delay, bad faith, or prejudice in the record. Because DRAC alleges on appeal that the court's legal ruling buttressing the denial of amendment was in error, we review *de novo* the district court's determination that § 3604(f)(2) of the FHAA requires that a disabled person have an interest in actually

renting or purchasing a dwelling in order to allege a violation. *See* Southwest Voter Registration Educ. Project, 344 F.3d at 918.

With regard to the dispute over DRAC's standing separate and apart from any tester injury, we review *de novo* the district court's conclusion that DRAC lacked organizational standing to bring the instant litigation. *See* Fair Housing of Marin v. Combs, 285 F.3d 899, 902 (9th Cir. 2002), *cert. denied*, 537 U.S. 1018, 154 L. Ed. 2d 425, 123 S. Ct. 536 (2002).

DISCUSSION

DRAC has asserted two bases for its standing. First, it claims standing as a representative of its members, *see* Hunt v. Washington Apple Advertising Comm'n, 432 U.S. 333, 343, 53 L. Ed. 2d 383, 97 S. Ct. 2434 (1977), including testers like Smith, who were allegedly subjected to limited housing opportunities and overtly discriminatory conditions stemming from Pacific Properties' failure to comply with the law. Second, DRAC claims organizational standing in its own right, alleging that Pacific Properties' discriminatory practices negatively impacted its organizational mission and caused DRAC to redirect scarce resources to combat discrimination by Pacific Properties. *See, e.g.*, Fair Housing of Marin, 285 F.3d at 905. While DRAC's representational standing is contingent upon the standing of its members to bring suit, *see* Hunt, 432 U.S. at 343, DRAC's organizational standing is separate from the standing of its members, turning instead on whether the organization itself has suffered an injury in fact. *See* Havens Realty Corp. v. Coleman, 455 U.S. 363, 378-79, 71 L. Ed. 2d 214, 102 S. Ct. 1114 (1982). We

address each of these bases for DRAC's standing separately below.

A. Representational Standing

[1] To establish representational standing, DRAC must demonstrate that:(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to vindicate are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. Hunt, 432 U.S. at 343. The district court determined that DRAC lacked representational standing because it could not demonstrate that any one of its members, including the tester Smith, had standing to sue.

DRAC concedes that none of its members have any interest in actually purchasing or renting property from Pacific Properties. It contends, nonetheless, that § 3604(f)(2), like other provisions of the FHAA and the original Fair Housing Act ("FHA"), 42 U.S.C. § 3601 et seq. (1968), creates a broad right to be free from discrimination that may be enforced by disabled persons (or those acting for them) even if they are "testers," i.e., someone having no interest in actually buying or renting that poses as buyer or renter to collect evidence of unlawful housing practices. *See* Havens, 455 U.S. at 373. The district court disagreed, finding that § 3604(f)(2) "does not create a broad right to the opportunity to buy or rent a dwelling that is unconnected to any interest in actually renting or buying a dwelling."

Testers have played a long and important role in fair housing enforcement, stemming from the Supreme Court's two-decade-old determination that with the FHA, Congress intended to establish a broad set of rights to be free from housing discrimination, and that as a general rule, courts should not erect standing barriers -- other than the minima required by Article III -- to those seeking to vindicate these rights. *See* Havens, 455 U.S. at 372-73; *see also* Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 103, 60 L. Ed. 2d 66, 99 S. Ct. 1601 (1979). The high court more recently cautioned that courts be no less generous in interpreting provisions added to the FHA by the FHAA. *See* City of Edmonds v. Oxford House, Inc., 514 U.S. 725, 731, 131 L. Ed. 2d 801, 115 S. Ct. 1776 (1995).

[2] We begin our analysis with the various enforcement provisions of the FHA and FHAA. The citizen suit provision of the FHA permits enforcement by "any person . . . who claims to have been injured by a discriminatory housing practice." 42 U.S.C. § 3602(i)(1). Broad construction of the "any person" language was subsequently extended to 42 U.S.C. § 3604(d) n6 of the FHA by the Supreme Court in Havens. 455 U.S. at 373. The Court concluded that § 3604(d) confers on "all 'persons' a legal right to truthful information about available housing." *Id.* In reaching this end, the Court contrasted the language of 42 U.S.C. § 3604(a), which prohibits the refusal to sell or rent in the face of a "bona fide offer" because of race, color, religion, and so on, with that of 42 U.S.C. § 3604(d), which more broadly prohibits misrepresentation to "any person" for the same reasons. 455 U.S. at 374. Because Congress "plainly omitted any such requirement [of a bona fide offer] insofar as it banned discriminatory

representations in [3604(d)]," that a tester "may have approached the real estate agent . . . without any intention of buying or renting a home, does not negate the simple fact of injury within the meaning of [3604(d)]." *Id.*

When Congress enacted the 1988 amendments to the FHA, it spoke in even broader terms, changing the language of § 3604(d) by making it unlawful for the first time: "To represent to any person because of . . . handicap . . . that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available." 42 U.S.C. § 3604(d) (1988), *amending* 42 U.S.C. § 3604(d) (1968). Congress also added 42 U.S.C. § 3604(f), a section dealing specifically with discrimination based on handicap. Under the Court's broad holding in *Havens*, testers began to and still most often do bring suit under § 3604(d), specifically because that section has been held not to require an actual intention to rent or buy the property in question. The issue of whether the Court's interpretation in *Havens* extends to § 3604(f)(2) is an issue of first impression. We therefore look at how other provisions of the FHA and FHAA have been interpreted in determining the answer.

[3] The language of § 3604(f)(2) replicates that of its predecessor, 42 U.S.C. § 3604(b); n7 it is simply directed specifically to discrimination based on handicap, rather than race, color, religion, sex, familial status or national origin. The Seventh Circuit has determined that § 3604(b) of the FHA is violated, even in the absence of an actual intention to rent or buy a property, when a landlord offers black testers apartments at higher rental rates than those offered to white testers. *See*

United States v. Balistrieri, 981 F.2d 916, 929 (7th Cir. 1992). This is because § 3604(b), like § 3604(d), prohibits discrimination against "any person" in the terms or conditions of rentals. *See* Balistrieri, 981 F.2d at 929; *see also* Village of Bellwood v. Dwivedi, 895 F.2d 1521, 1527 (7th Cir. 1990) ("[T]he logic of *Havens* embraces discrimination in the provision of services, forbidden explicitly by section 3604(b) and implicitly by section 3604(a).").

Pacific Properties argues that § 3604(b) is not relevant to the instant inquiry, because that section specifically excludes discrimination based on disability--that racial, gender, or other enumerated tester groups may have standing under § 3604(b) is inapposite because disabled testers are different from those seeking to redress discrimination against other protected classes. Disabled testers, Pacific argues, have no need to undertake investigations to determine whether the terms and conditions of sale or rental create barriers to accessibility, because such violations would be readily apparent to anyone attempting to rent or buy. Pacific concludes that Congress recognized this difference when it created a special section for disability discrimination with § 3604(f)(2).

[4] But the plain statutory language of § 3604(f)(2) both replicates that of § 3604(b), and adds additional classes of individuals who may seek to enforce rights under the provision based on either their own disability or that of another. 42 U.S.C. § 3604(f)(2)(A)-(C), *supra* n.3. We refuse to accept the notion that Congress could somehow have intended different standing requirements for identical provisions. This is particularly true when one looks to § 3604(f)(2)'s sister

provision, § 3604(f)(1), a more narrow provision that tracks the language of § 3604(a), limiting the class of affected individuals to "any buyer or renter," n8 just as § 3604(a) is limited to "any person" making "a bona fide offer" to sell or rent.

It is also significant that while § 3604(f)(1) explicitly prohibits discrimination "in the sale or rental, or to otherwise make unavailable or deny, a dwelling . . . because of a handicap," § 3604(f)(2) prohibits a broader set of behavior, making it illegal to even discriminate "in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap . . . ." 42 U.S.C. § 3604(f)(1), (2). The logical conclusion is that the group of individuals that could fall victim to the latter class of broader and less specific behaviors would be, *a fortiori*, larger and less specific than the enumerated class of renters and buyers affected by the former prohibition.

Moreover, the district court noted that "while a 'tester' may have standing under § 3604(f)(2), the language of § 3604(f)(2) makes plain that the injury to the tester must arise from something more than merely observing a discriminatory architectural feature." The court therefore apparently recognized the possibility of disabled tester standing under this section but simply attempted to distinguish the facts of this case based on what that tester must accomplish in order to gain standing. To read an additional standing requirement into the statute beyond mere observation, however, ignores that many overtly discriminatory conditions, for example, lack of a ramped entryway, prohibit a disabled individual from forming the requisite intent or

actual interest in renting or buying *for the very reason* that architectural barriers prevent them from viewing the whole property in the first instance. More importantly, the district court's reasoning fails to recognize the dignitary harm to a disabled person of observing such overtly discriminatory conditions.

[5] Interpreting § 3604(f)(2) to exclude these individuals from enforcing their right to be free from discrimination undermines the specific intent of the FHAA, which is to prevent disabled individuals from feeling as if they are second-class citizens. *See generally*, H.R. REP. 100-711, at 17-18 (1988). The district court therefore erred as a matter of law in interpreting § 3604(f)(2) to preclude tester standing, and as a consequence, DRAC's representational standing. The district court's subsequent denial of leave to amend or reconsider based on this interpretation was an abuse of discretion. n9 *See* Washington, 98 F.3d at 1163.

B. Organizational Standing

[6] On the merits of the motion to dismiss, the district court also committed legal error when it determined that DRAC, as an organization, did not have standing "separate and apart" from Smith under § 3604(f)(2). We need look no further than the statute itself, our recent decision in Fair Housing of Marin v. Combs, and the face of DRAC's complaint to discover where that error lies. Section 3602(d) of the FHA defines "person" to include "corporations" and "associations." 42 U.S.C. § 3602(d) (1988). As a threshold matter, DRAC, a non-profit corporation, is a "person" protected by the statute. *See* Havens, 455 U.S. at 378-79 & n.19; Walker

v. City of Lakewood, 272 F.3d 1114, 1123, n.1 (9th Cir. 2001). DRAC must therefore satisfy the requirement for individual standing: a demonstration of concrete and particularized injury giving DRAC "a personal stake in the outcome of the controversy." Baker v. Carr, 369 U.S. 186, 204, 7 L. Ed. 2d 663, 82 S. Ct. 691 (1962); *see also* Havens, 455 U.S. at 378-79; Warth v. Seldin, 422 U.S. 490, 508, 45 L. Ed. 2d 343, 95 S. Ct. 2197 (1975).

In addition to interpreting § 3604(d) for purposes of tester standing, *Havens* analyzed the independent standing of Housing Opportunities Made Equal, or HOME, an organization which, like DRAC, utilized testers. Based on HOME's complaint, which alleged that its efforts "to assist equal access to housing" had been "frustrated" by defendants' practices and that it had devoted "significant resources to identify and counteract" those practices, the Court found that HOME had sufficiently alleged injury for standing in its own right. 455 U.S. at 379. "Such concrete and demonstrable injury to the organization's activities--with the consequent drain on the organization's resources--constitutes far more than simply a setback to the organization's abstract social interests." *Id.* ( *citing* Sierra Club v. Morton, 405 U.S. 727, 739, 31 L. Ed. 2d 636, 92 S. Ct. 1361 (1972)).

[7] In *Fair Housing*, we interpreted *Havens* to stand for the proposition that an organization may satisfy the Article III requirement of injury in fact if it can demonstrate: (1) frustration of its organizational mission; and (2) diversion of its resources to combat the particular housing discrimination in question. Fair Housing, 285 F.3d at 905; *see also* Lakewood, 272 F.3d at 1124. *Fair Housing* avoided the question whether

the expense of litigation alone is enough to constitute a "diversion of resources" under this test, 285 F.3d at 905, but the court had previously indicated that such an allegation is generally insufficient. Lakewood, 272 F.3d at 1124, n.3. At the 12(b)(6) stage of litigation, we must look to the general allegations contained in the complaint to determine whether DRAC has met its burden of proof. Lujan v. Defenders of Wildlife, 504 U.S. 555, 561, 119 L. Ed. 2d 351, 112 S. Ct. 2130 (1992).

[8] On the face of its complaint, DRAC alleged that it is a non profit corporation "organized with the principal purpose of helping to eliminate discrimination against individuals with disabilities by ensuring compliance with laws intended to provide access to housing, public buildings, transportation, goods and services . . . . Part and parcel to this effort is ensuring an adequate stock of accessible housing for those who are freed to leave the nursing homes." Any violation of the FHAA would therefore constitute a "frustration of [DRAC's] mission." Fair Housing, 285 F.3d at 905. The complaint pled with particularity two causes of action for violations of the FHAA at five Pacific Properties developments.

[9] With regard to diversion of resources, DRAC specifically stated in its complaint that "in order to monitor the violations and educate the public regarding the discrimination at issue, DRAC has had (and, until the discrimination is corrected, will continue) to divert its scarce resources from other efforts to promote awareness of--and compliance with--federal and state accessibility laws and to benefit the disabled community in other ways (for example, DRAC's efforts to free disabled persons from nursing homes.)[.]"

Bearing in mind that DRAC's claim was dismissed without leave to amend, n10 we believe these allegations are enough to constitute a showing of a "diversion of resources" and to survive a 12(b)(6) motion; at this point in the litigation, we presume that "general allegations embrace those specific facts that are necessary to support a claim." *See* Lujan v. Nat'l Wildlife Fed'n, 497 U.S. 871, 889, 111 L. Ed. 2d 695, 110 S. Ct. 3177 (1990). Because the district court gave no explanation for its finding that DRAC failed to allege organizational standing other than to say that "DRAC has not shown that it has standing separate and apart from Smith," we accordingly reverse with regard to this finding on a *de novo* review of this court's own law. We also believe that the district court abused its discretion in denying DRAC leave to amend its complaint with regard to organizational standing prior to dismissal. *See* Eminence Capital LLC, 316 F.3d at 1052, *supra* n.10. The court's denial was particularly egregious in light of the fact that DRAC had indicated, in good faith, that it was willing and able to establish with greater specificity the diversion of its own resources from non-litigation activities as a result of Pacific Properties' discrimination. *See* Doe v. United States, 58 F.3d 494, 497 (9th Cir. 1995) ("a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not be cured by the allegation of other facts.") (citation and internal quotation marks omitted).

C. Disgorgement

DRAC's third argument on appeal looks beyond the threshold question of standing, focusing instead on the

proper remedy for its claim should it succeed on the merits. In its initial complaint, DRAC claimed and sought remedy for "disgorgement of unjust enrichment," alleging that Pacific Properties' "failure to promptly retrofit inaccessible dwellings . . . to conform with federal civil rights law . . . has conferred (and continues to confer) an economic benefit (whether direct or indirect) to Defendant." The district court dismissed this claim and remedy, noting a dearth of case law supporting the proposition that a non-governmental plaintiff may properly seek to disgorge an entity with whom they are not in privity. We agree.

[10] As Pacific Properties correctly notes, outside of the securities litigation context, the remedy of disgorgement only arises where a prior relationship between the parties subject to and benefitting from disgorgement originally resulted in unjust enrichment. *See e.g.*, Mitchell v. Robert de Mario Jewelry, Inc., 361 U.S. 288, 291-92, 4 L. Ed. 2d 323, 80 S. Ct. 332 (1960) (wages withheld in violation of Fair Labor Standards Act disgorged from employer and reimbursed to employee); Porter v. Warner Holding Co., 328 U.S. 395, 397-99, 90 L. Ed. 1332, 66 S. Ct. 1086 (1946) (rent increases in violation of Emergency Price Control Act of 1942 disgorged from landlord and refunded to tenants). As DRAC concedes, no relationship pre-existed the instant litigation allowing DRAC to be viewed as the rightful recipient of whatever funds could be disgorged from Pacific Properties. We therefore affirm the district court's dismissal of this claim and remedy.

CONCLUSION

The history and language of the FHA and the FHAA make clear that testers fall within the protected group of "any person[s] "that may enforce rights created by § 3604(f)(2) when they are violated by discriminatory housing conditions. The district court's denial of reconsideration and leave to amend based on a contrary determination was therefore an abuse of discretion. DRAC has also made a sufficient showing to support its claim of organizational standing. As to these issues, the judgment of the district court is reversed and the matter remanded for further proceedings consistent with this opinion. With regard to the remedy of disgorgement, we agree that dismissal was appropriate. The judgment of the district court is

REVERSED in part, AFFIRMED in part and REMANDED. Costs on appeal to Plaintiff-Appellant.

Footnotes

n1 Mr. Smith has since passed away and, as a result, is not a party to this appeal. The Disabled Rights Action Committee remains as the only named plaintiff.

n2 Smith allegedly encountered discrimination at the following Pacific Properties Developments: Pacific Adagio ("Adagio"), Pacific Carlisle ("Carlisle"), Pacific Deerfield ("Deerfield"), Pacific Legends East ("Legends East").

n3 Title 42. The Public Health and Welfare § 3604. Discrimination in the sale or rental of housing and other prohibited practices

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful—

(f)(2) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of—

(A) that person; or

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that person.

n4 The dismissal was without leave to amend, despite DRAC's request to amend in its Opposition to the Motion to Dismiss.

n5 The district court did not include its reasons for denying the motion to reconsider in its order, but DRAC conceded in its motion that if the court was bound by its legal determination in regard to tester rights under § 3604(f)(2), then its request to amend its allegation of representational standing would be futile:Plaintiffs concede, of course, that if the Court adheres to it's [sic] narrow construction of 42 U.S.C. § 3604(f)(2) (i.e. that "merely" observing discriminatory architectural features does not constitute being subjected to discrimination in the terms, conditions, or privileges of sale or rental), then such amendment would be futile as regards DRAC's other members (who are injured in the manner that Mr. Smith was injured--i.e., by being subjected to discriminatory

conditions of sale or rental at properties that they do not live at and where they have no interest in living) and as regards DRAC's representational standing (which is "piggyback" to its members' standing).

n6 Title 42. The Public Health and Welfare§ 3604. Discrimination in the sale or rental of housing and other prohibited practices

As made applicable by section 803 and except as exempted by sections 803(b) and 807, it shall be unlawful--

(d) To represent to any person because of race, color, religion, sex, or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.*amended by* 42 U.S.C. 3604(d) (1988).

n7 Title 42. The Public Health and Welfare§ 3604. Discrimination in the sale or rental of housing and other prohibited practices

As made applicable by section 803 and except as exempted by sections 803(b) and 807, it shall be unlawful--

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, or national origin.*amended by* 42 U.S.C. 3604(b) (1988).

n8 Title 42. The Public Health and Welfare§ 3604. Discrimination in the sale or rental of housing and other prohibited practices

As made applicable by section 3603 of this title and except as exempted by sections 3603(b) and 3607 of this title, it shall be unlawful--

(f)(1) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of--

(A) that buyer or renter,

(B) a person residing in or intending to reside in that dwelling after it is so sold, rented, or made available; or

(C) any person associated with that buyer or renter.

n9 In light of Smith's death, on remand, DRAC should be allowed to amend its complaint with regard to representational standing in accordance with this opinion.

n10 The district court does not explain why it refused to allow DRAC to amend its complaint despite repeated requests. "A simple denial of leave to amend without any explanation by the district court is subject to reversal. Such a judgment is 'not an exercise of discretion; it is merely an abuse [ ] of discretion . . . .' "Eminence Capital, LLC v. Aspeon, Inc., 316 F.3d 1048, 1052 (9th Cir. 2003), *quoting* Foman, 371 U.S. at 182. DRAC has indicated that it would be capable of amending its complaint upon remand to clearly come

within the *Fair Housing* requirements on the merits of the standing inquiry.

Case No. CV-S-01-1277-LDG (LRL)

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

RONALD RAY SMITH, et al.,
Plaintiffs,

v.

PACIFIC PROPERTIES AND
DEVELOPMENT CORPORATION,
Defendant.

ORDER

The plaintiffs, Ronald Smith and Disabled Rights Action Committee (DRAC), allege that defendant Pacific Properties and Development Corporation has developed several rental dwelling communities, and that these communities and dwelling units in the communities have various architectural features that discriminate against handicapped persons. Pacific Properties moves to dismiss (#3) the complaint on various theories.

Motion to Dismiss

In considering a motion to dismiss for failure to state a claim upon which relief can be granted, the Court accepts as true the material allegation of the complaint and construes them in the light most favorable to the plaintiff. *Jacobellis v. State Farm Fire & Cas. Co.*, 120 F.3d 171, 172 (9th Cir. 1997). A dismissal under Fed. R. Civ. P. 12(b)(6) is essentially a ruling on a question of

law. *Lewis v. Telephone Employees Credit Union*, 87 F.3d 1537, 1545 (9th Cir. 1996). For a defendant to succeed, it must appear to a certainty that the plaintiff will not be entitled to relief under any set of facts that could be proven under the allegations of the complaint. *Jacobellis*, 120 F.3d at 172

Background

The plaintiffs' complaint alleges that Pacific Properties has constructed, for first occupancy after March 13, 1991, five residential rental communities within Las Vegas. Smith, who requires a wheelchair for mobility, visited four of the communities in November and December 1997 and January 1998. During the visity he encountered inaccessible architectural features, such as interior doorways that were too narrow and thermostats placed to high. Smith filed complaints with the United States Department of Housing and Urban Development (HUD) as to each of these four communities in early 1998.

As a result of Smith's complaints, HUD investigated and confirmed the existence of discriminatory conditions at the four properties. On February 18, 2001, the United States filed both a complaint against Pacific Properties and a Consent Decree.

On July 19, 2001, Smith visited an additional Pacific Property community, Savannah and encountered unidentified architectural features limiting accessibility in common areas.

On October 30, 2001, the plaintiffs filed the instant complaint, alleging a claim discriminatory conditions of

sale or rental pursuant to 42 U.S.C. §3604(f)(2), a claim of "Notice of Limitation and Discrimination Based on Handicap" pursuant to 42 U.S.C. §3604(c), and a claim for "Disgorgement."

Discriminatory Conditions of Sale or Rental

Pacific Properties asserts that neither the individual plaintiff, Ron Smith, nor the organizational plaintiff, DRAC, have alleged standing to bring a claim pursuant to 42 U.S.C. §3604(f)(2). Specifically, the defendant asserts that Smith has not alleged an injury in fact, because he has not alleged that he was a resident of any of the communities or that he had any interest in becoming a resident of any of the communities. Further, Pacific Properties asserts that, as Smith cannot show standing, and as DRAC has not specifically alleged the standing of any other individual plaintiff that it represents in this matter, DRAC also lacks standing.

Smith concedes that he has not alleged that he is a resident or interested in becoming a resident of any of the Pacific Properties' communities in the Las Vegas area. Nevertheless, he argues that §3604(f)(2) extends standing to "any person," and thus he has "tester standing."fn1 Smith relies upon cases construing §3604(d), which prohibits misrepresentations to "any person" regarding the availability of a dwelling because of handicap, race or other enumerated factors. Courts have uniformly held that, by §3604(d), Congress created a new substantive right (to be free from misrepresentation) that extends to "any person." As such, the violation of this right as against any person is an injury-in-fact that confers standing upon the person

to whom the misrepresentation was made. The person need not have had an actual interest in renting or buying a dwelling, but only an interest in receiving accurate information regarding the availability of a dwelling. Smith suggests that, through §3604(f)(2), Congress created a substantive right to the opportunity to buy or rent a dwelling without being subjected to discrimination.

Smith's argument fails, because §3604(f)(2) does not create a broad right to the opportunity to buy or rent a dwelling that is unconnected to any interest in actually renting or buying a dwelling. Rather, to the extent that §3604(f)(2) creates a new substantive right in the housing market, it is the right of any person to be free from discrimination in the terms, conditions, or privileges of sale or rental of a dwelling. The court recognizes that this right is not limited to the renter or buyer of a dwelling. Nevertheless, the injury must arise from a violation of this right, not from a violation of a broader but unrecognized 'right to the opportunity to rent.' For example, while §3604(d) extends to any person the right to be free of misrepresentation, standing is extended only to those persons to whom a misrepresentation is made. Similarly, while § 3604(f)(2) extends certain rights to any person, standing is extended only to those persons who have been subjected to discrimination in the terms, conditions, or privileges of sale or rental of a dwelling. While a "tester" may have standing under §3604(f)(2), the language of §3604(f)(2) makes plain that the injury to the tester must arise from something more than merely observing a discriminatory architectural feature. In this matter, Smith has alleged only that he observed architectural features that limited accessibility at the

subject properties. Accordingly, Smith lacks standing. Further, DRAC has not shown that it has standing separate and apart from Smith. Accordingly, the court will dismiss the first claim.

Notice of Limitation

Pacific Properties asserts that the second claim must be dismissed, as the plaintiffs have not stated a cognizable claim. Specifically, Pacific Properties asserts that the design and construction of a building does not constitute a "notice of limitation and discrimination based on handicap," prohibited by 42 U.S.C. §3604(c).

Section 3604(c) provides, in relevant part, that it is unlawful "to make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on . . . handicap . . . or an intention to make any such preference, limitation, or discrimination." The subsection plainly applies to the notices, statements, or advertisements of discrimination intended to convey a message, not to the underlying discriminatory condition merely because it can be observed. While §3604(c) may not require an intent to convey a message of discrimination, the plain language of the subsection requires and intent to convey some message in the form of a notice, a statement, or an advertisement. The court cannot agree that an architectural feature, such as the width if a doorway or the height of a thermostat, was chosen and executed with an intent to convey some message. Further, such architectural features are not in the form

of a notice, a statement, or an advertisement. Accordingly, the court will dismiss this claim.

Disgorgement

In their last "claim", Smith and DRAC seek the remedy of disgorgement. Not only must this remedy be dismissed as there is no cognizable claim in this case, but the court notes the lack of any case law suggesting that Smith and DRAC (as non-governmental plaintiffs) can employ this remedy against an entity with whom they lack privity.

Therefore, for good cause shown,

THE COURT ORDERS that Defendant's Motion to Dismiss (#3) is GRANTED.

DATED this 10th day of October, 2002.

Lloyd D. George
United States District Judge

Footnotes

fn1 A tester lacks any interest in renting or buying a dwelling, but nevertheless represents himself as being interested in buying or renting the dwelling in order to determine whether the seller or landlord is engaging in discrimination

Case No. CV-S-01-1277-LDG (LRL)

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

RONALD RAY SMITH, et al.,
Plaintiffs,

v.

PACIFIC PROPERTIES AND
DEVELOPMENT CORPORATION,
Defendant.

JUDGMENT IN A CIVIL CASE

X Decision by Court. This action came to be considered by the Court. The issues have been considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Defendant's Motion to Dismiss is granted and Judgment is entered in favor of Defendant and against Plaintiff.

October 11, 2002
Date

LANCE S. WILSON
Clerk

(By) Deputy Clerk

Case No. CV-S-01-1277-LDG (LRL)

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

RONALD RAY SMITH, et al.,
Plaintiffs,

v.

PACIFIC PROPERTIES AND
DEVELOPMENT CORPORATION,
Defendant.

ORDER

For good cause shown,

THE COURT ORDERS that the Plaintiffs' Motion for Reconsideration (#15) is DENIED.

DATED this 31 day of March, 2003.

Lloyd D. George
United States District Judge

No. 03-15656
D.C. No. CV-01-01277-LDG
District of Nevada, Las Vegas

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RONALD RAY SMITH,
Plaintiff,

And

DISABLED RIGHTS ACTION COMMITTEE,
a Utah non-profit corporation,
Plaintiff-Appellant,

v.

PACIFIC PROPERTIES AND DEVELOPMENT
CORPORATION, a Nevada corporation,
Defendant-Appellee.

Filed: March 11, 2004

ORDER

Before: HAWKINS, PAEZ, and BERZON, Circuit Judges.

The panel has voted to deny Appellee's Petition for Rehearing En Banc.

The full court has been advised of the Petition for Rehearing En Banc and no Judge has requested a vote

on whether to rehear the matter en banc. Fed. R. App. P. 35.

The Petition for Rehearing En Banc is DENIED.

No. 04-11

Supreme Court, U.S.
FILED
JUL 29 2004
OFFICE OF THE CLERK

In The

# Supreme Court of the United States

PACIFIC PROPERTIES AND DEVELOPMENT CORPORATION,

*Petitioner,*

v.

DISABLED RIGHTS ACTION COMMITTEE,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether the Court of Appeals erred in recognizing that the dignitary harm conveyed by the "mere" observation of overtly discriminatory conditions is sufficient to constitute the distinct and palpable injury that is required to satisfy the case or controversy limitation provided under Article III of the United States Constitution.

## CORPORATE DISCLOSURE STATEMENT

Respondent is the Disabled Rights Action Committee, a Utah nonprofit corporation having members residing in Las Vegas, Nevada. Respondent is a member-based organization, and has no stock nor any corporate affiliations. The Disabled Rights Action Committee was one of the plaintiffs in the District Court, and the appellant in the Ninth Circuit Court of Appeals.

## BRIEF IN OPPOSITION

Respondent, Disabled Rights Action Committee ("DRAC") hereby opposes the Petition for a Writ of Certiorari which was timely filed by Petitioner, Pacific Properties and Development Corporation (Pacific Properties) and docketed by this Court on July 2, 2004.

## REASONS FOR DENYING REVIEW

### I. THE QUESTION PRESENTED WAS NOT ADDRESSED BY THE NINTH CIRCUIT.

In the decision below, the Ninth Circuit was presented with a matter of statutory construction. In *Smith v. Pacific Properties and Development Corp.*, 358 F.3d 1097, 1103-04 (9th Cir. 2004), the Ninth Circuit found that 42 U.S.C. § 3604(f)(2) provides the same broad standing ("tester standing") that was recognized by this Court with regard to 42 U.S.C. § 3604(d) (see *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74 (1982)) and by the Seventh Circuit with regard to 42 U.S.C. § 3604(b) (see *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1527 (7th Cir. 1990), *United States v. Balistrieri*, 981 F.2d 916, 929 (7th Cir. 1992)). The question presented by Pacific Properties does not, however, concern statutory construction. Instead, the question presented concerns the "sufficiency" of an injury for the purposes of Article III's requirement of an "injury in fact." Petition ("Pet.") at i-ii. The Ninth Circuit, however, never addressed the "sufficiency" of injuries conveyed by "mere observation" for the purpose of satisfying Article III.

"[I]t is a sound exercise of discretion for the Court to allow [other courts] to serve as laboratories in which the

issue receives further study before it is addressed by this Court." *McCray v. New York*, 461 U.S. 961, 963 (1983) (STEVENS, J., respecting denial of petitions for writs of certiorari). Thus, "in the absence of consideration of [a] matter by the Court of Appeals, [this Court will] not consider it." *Meyer v. Holley*, 537 U.S. 280, 291-92 (2003), citing *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 212-13 (1998) and *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147, n. 2 (1970).

## II. THE DECISION OF THE NINTH CIRCUIT WAS CORRECT AND CONSISTENT WITH THIS COURT'S DECISIONS.

Even if the question presented had been addressed by the Ninth Circuit, it is clear enough that this Court's decisions do not support the judicial limitation on congressional authority that Pacific Properties seeks to impose. Clearly, "Congress may enact statutes creating legal rights, the invasion of which creates standing, even though no injury would exist without the statute." *Linda R.S. v. Richard D.*, 410 U.S. 614, 617 n. 3 (1973). See also, *Village of Bellwood v. Dwivedi*, 895 F.2d 1521, 1526-27 (7th Cir. 1990) ("Congress can create new substantive rights, such as a right to be free from misrepresentations, and if that right is invaded, the holder of the right can sue without running afoul of Article III, even if he incurs no other injury (for example, the loss of a home-buying opportunity.")

Pacific Properties' argument is laden with the imaginary and the hypothetical. Pacific Properties asks the Court to "imagine" causes of action based upon non-existent statutes that could be similar to the broad standing provided by Congress under 42 U.S.C. § 3604(f)(2). Pet.

at 8. By discussing imaginary statutes, Pacific Properties assumes (without argument) that the broad standing accorded under 42 U.S.C. § 3604(f)(2) (and similarly-worded sections such as 42 U.S.C. § 3604(b) and 42 U.S.C. § 3604(d)) is nothing more than a judicial creation. Moreover, Pacific Properties' focus on hypothetical statutes (along with a hypothetical "parade of horribles" that would stem from Congress' unbridled dispensing of broad standing through legislation) is contrary to the same "case or controversy" limitation on judicial power that Pacific Properties contends the Ninth Circuit has overstepped. Pacific Properties' support for its contention that the "[m]ere observation of an act does not cause a constitutionally cognizable injury." (Pet. at 15) is limited to five cases which cases are each addressed, *infra*.

First, *Warth v. Seldin*, 422 U.S. 490 (1975) concerned alleged violations of 42 U.S.C. §§ 1981, 1982 and 1983 – not of any violation of the Fair Housing Act. *Id.* at 493. Where the Fair Housing Act is at issue, broader standing is applicable. See, e.g., *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 907 (2d Cir. 1993) (affirming an award of "$2500 to each of the four individual plaintiffs to compensate them for the emotional distress they suffered as a result of *viewing* the defendants' ads." (Emphasis added)).

Second, Pacific Properties' contention (that injury occasioned by observation of discriminatory conditions is insufficient for standing under Article III) is plainly *contradicted* (rather than supported) by cases concerning citizen suits seeking the enforcement of environmental laws. Thus, this Court has:

> . . . held that environmental plaintiffs adequately allege injury in fact when they use the affected area and are persons "for whom the aesthetic and recreational values of the area will be lessened" by the challenged activity. *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972). See also *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562-63 ("Of course, the desire to use or *observe* an animal species, *even for purely esthetic purposes*, is undeniably a cognizable injury for purposes of standing.").

*Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 183 (2000) (emphasis added).

Finally, Pacific Properties' citations to *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) and to *Gladstone Realtors v. Village of Bellwood,* 441 U.S. 91 (1979) do not concern "tester standing" – they concern "neighborhood standing." As this Court has noted, however, the "concept of 'neighborhood' standing differs from that of 'tester' standing" because "the injury underlying 'tester' standing – the denial of the tester's own statutory right to truthful information – is a direct one." *Havens Realty Corp. v. Coleman,* 455 U.S. at 375.

As the Ninth Circuit noted, observing discriminatory conditions constitutes a direct injury to DRAC's members in the form of dignitary harm. Pacific Properties does not contend that such dignitary harm is not real. Indeed, any such contention would run afoul of *Curtis v. Loether*, 415 U.S. 189, 195 (1974), where this Court held that violations of the Fair Housing Act are in the nature of dignitary torts. Instead, Pacific Properties contends that the *means* by which someone becomes *aware* of discrimination is

determinative for the purpose of meeting the Article III minima of injury in fact. Thus, Pacific Properties seeks to distinguish *Havens*, where "testers" (persons having no interest in the housing at issue) were subjected to racial "steering" in violation of 42 U.S.C. § 3604(d)) from members of DRAC who act as testers for violations of 42 U.S.C. § 3604(f)(2). In order for its argument to have any weight, Pacific Properties must make a distinction between testers who are made aware of discrimination by verbal statements (as in *Havens*) and testers who are made aware of discrimination by visual observation (as with DRAC's members). Pacific Properties, however, has undermined any such distinction by noting that, where dignitary harm has been occasioned by "gaining knowledge" about a discriminatory condition, it logically does not "matter whether that knowledge was gained through direct observation or from other means." Pet. at 9-10.

## CONCLUSION

For all of the foregoing reasons, Respondent Disabled Rights Action Committee respectfully requests that this Court deny Petitioner Pacific Properties and Development Corporation's Petition for a Writ of Certiorari.

Respectfully submitted,

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(3)

No. 04-11

IN THE

# Supreme Court of the United States

PACIFIC PROPERTIES AND DEVELOPMENT CORPORATION, PETITIONER

*v.*

RONALD RAY SMITH AND DISABLED RIGHTS ACTION COMMITTEE

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## REPLY BRIEF

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## I. Introduction

Petitioner, Pacific Properties And Development Corporation, hereby replies to the Brief in Opposition to the Petition for Writ of Certiorari previously filed by Respondent, Disabled Rights Action Committee (hereinafter DRAC).

Pacific wishes to address several new matters raised in DRAC's Opposition through this Reply Brief. The matters to be addressed will be: DRAC's incorrect assertion that the questions presented by the Petition for Writ of Certiorari were not addressed by the Ninth Circuit; the fact that DRAC incorrectly claims that its standing is based on injury to a statutorily created right; and the fact that DRAC misconstrues the prior decisions of this court to allow standing in this case. Each of these issues will be addressed individually below.

## II. The Ninth Circuit's Decision Necessarily Included the Question Presented by This Petition

DRAC initially claims that Pacific Properties' Petition for a Writ of Certiorari should be denied because the Ninth Circuit's opinion was limited to an interpretation of whether DRAC's claim came under the Fair Housing Act. The Ninth Circuit did in fact interpret 42 U.S.C. §3604(f)(2) to encompass DRAC's claims. However, by necessity that interpretation included a decision that the injury DRAC's members claimed passed constitutional muster. This Court has previously noted that the "irreducible constitutional minimum" of standing requires an injury in fact. *Lujan*

*v. Defenders of Wildlife*, 504 U.S. 555, 560, 112 S.Ct. 2130, 2136 (1992). Since the injury requirement is constitutionally based, the Ninth Circuit's decision that mere observation of allegedly discriminatory construction was a sufficient injury to allow a plaintiff to bring a claim under § 3604(f)(2) must be consistent with constitutional precedent setting forth the parameters of the injury in fact requirement. Therefore, by definition, the Ninth Circuit's decision included a decision that mere observation of allegedly discriminatory construction is an injury in fact as previously defined by this Court. The fact that the Ninth Circuit did not articulate that decision does not mean that it did not address this issue. Failure to articulate a constitutional analysis does not relieve the Ninth Circuit of its obligation to ensure that its decisions are consistent with constitutional requirements. Put simply, the statutory construction engaged in by the Ninth Circuit raises the question presented in this Petition because the Ninth Circuit has engaged in that construction in a manner which would violate the United States Constitution. Apparently under DRAC's analysis, a circuit court is entitled to interpret statutes in a manner that would violate the Constitution so long as their decision does not state that they are considering the constitutional issues. Such a position is obviously ludicrous and should be not accepted by this Court.

## III. This Case Does Not Involve a Claim of Injury to a Congressionally Created Right

DRAC claims that its members would have standing because they claim injuries to congressionally created rights. Congress does have the power to

legislate new substantive rights, and injuries to those rights do convey standing. However, the key factor missing from DRAC's analysis is an explanation of what congressionally created right it claims is involved in this case. If this case involved claims under 42 U.S.C. §3604(d), then DRAC's argument would apply. In those cases, plaintiffs who receive false information suffer injury to their right to be free from misrepresentations regarding housing. In order for DRAC's argument to be applicable to this case, the Court would have to determine that Congress had created a right for people not to see allegedly discriminatory construction. DRAC provides no authority for its claim that Congress created such a right, and the reason for that omission is simple, Congress did not create such a right, and DRAC's arguments in this regard are inapplicable to this case. This case simply involves DRAC's claim that Pacific violated a congressional prohibition against discriminatory construction. Pacific has quite simply pointed out that DRAC has suffered no injury, within the meaning of the Constitution, as a result of any of Pacific's alleged conduct.

## IV. Recognizing Representational Standing for DRAC in This Case Is Inconsistent With Prior Decisions of This Court

DRAC claims that the injuries its members allegedly suffered are consistent with injuries this Court previously determined to be sufficient to convey standing, particularly injuries suffered by testers. Again, DRAC's arguments on this point simply miss the mark. Regardless of what type of standing a party seeks, a necessary predicate to having standing is that

that party has suffered an injury. DRAC claims here that it is relying on tester standing and then goes on to highlight why they have not alleged sufficient injury in this case to have any type of standing. DRAC notes that in previous cases tester standing has been upheld because a tester's right to receive truthful information had been violated. Again, that is not the case here. The only injury claimed by DRAC is that somebody observed a condition which they allege constitutes discrimination. The Ninth Circuit held that mere observation of that allegedly discriminatory condition constituted a sufficient injury for standing. DRAC has not alleged the type of injury suffered by testers in the cases it cites. Indeed, DRAC has not suffered the type of injury experienced by any of the Plaintiffs in any of the cases it cites. For example, DRAC claims that the type of injuries that it alleges in this case are the same as the injuries this Court recognized in *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.* 528 U.S. 167, 183 (2000). However, in that case, the Court based the sufficiency of the claimed injury on the fact that plaintiffs would have actually used the affected areas but for the defendants conduct. Since the defendants conduct allegedly prevented the plaintiffs from exercising a right they would have exercised in the absence of the defendant's conduct, the plaintiffs alleged an injury. Those allegations of injury are drastically different from what DRAC claims here. The sole injury alleged by DRAC to support its claim of representational standing is that one or more of its members observed allegedly discriminatory conditions at a location they had no particular interest in.

## V. Conclusion

DRAC claims that petitioner seeks to limit standing to cases where plaintiffs are injured by a particular means, but that misstates the issue. Pacific simply seeks to limit standing to those plaintiffs who have suffered an injury in fact as required by the Constitution. At issue is not the means by which someone supposedly suffers an injury, at issue is the nature of the injury itself. The nature of the injury approved by the Ninth Circuit in this case was mere observation of allegedly discriminatory construction. This Court has never determined that a Plaintiff alleging an injury like the injury DRAC claims had standing and indeed has rejected analogous claims of standing. Since the Ninth Circuit determined that DRAC does have standing based on these alleged injuries, the finding by the Ninth Circuit is contrary to the previous decisions of this Court. Accordingly, the appropriate course of action is for this Court to grant Petitioner's Petition for Writ of Certiorari.

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